Dato' Sri Andrew Kam Tai Yeow v Tan Sri Dato' Kam Woon Wah & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-352–09 OF 2017
YUSRIN FAIDZ JC
17 SEPTEMBER 2025

Civil Procedure — Damages — Undertaking for damages — Plaintiff furnished undertaking as to damages in relation to court's order for injunction to restrain defendants from dealing with assets — Injunction was set aside by Court of Appeal — Defendants filed application for assessment of damages pursuant to undertaking for damages — Whether setting aside of injunction amounted to a finding that injunctions were wrongly granted, thereby engaging the plaintiff's undertaking as to damages — Whether sale of defendants' assets would probably have been completed but for the injunctions — How damages should be assessed — Whether plaintiff's conduct in obtaining and maintaining injunctions warranted grant of exemplary or aggravated damages

The plaintiff, a shareholder of the second and third defendants, initiated proceedings alleging breaches of shareholders' agreement. Although the second to 11th defendants ('the corporate defendants') were not parties to the said agreement, the plaintiff nevertheless obtained interim injunctions against them to restrain the disposal of their principal assets, namely an oil palm plantation and a palm oil mill ('the assets'). It ought to be noted that at the material time, there was a letter of intent ('the LOI') executed in which a company known as Matang Bhd expressed its intention to acquire the assets for RM180m. The injunctions remained in place for several years until they were set aside by the Court of Appeal in 2022. In this regard, the Court of Appeal held that the corporate defendants were improperly joined to the action as they were not privy to the shareholders' agreement that underpinned the plaintiff's claim. The corporate defendants then filed the present application for assessment of damages pursuant to the undertaking as to damages furnished by the plaintiff. The following issues arose for determination: (a) entitlement to damages: whether the Court of Appeal's setting aside of the injunctions amounted to a finding that the injunctions were wrongly granted, thereby engaging the plaintiff's undertaking as to damages; (b) causation and the LOI: whether the LOI between the corporate defendants and Matang Bhd was enforceable, and whether the sale would probably have been completed but for the injunctions; (c) quantum of damages: if entitlement was established, how damages should be assessed — in relation to this issue, the plaintiff relied on the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (*Tan Sri Khoo*'s case) to argue that because the corporate defendants'

plantation and mill assets had appreciated in value over time, no damages had been suffered; and (d) exemplary or aggravated damages: whether the plaintiff's conduct in obtaining and maintaining the injunctions warranted the grant of punitive or aggravated damages.

Held, ordering the plaintiff to pay the defendants the sum of RM36m as damages, together with interest at the rate of 5%pa from 6 August 2025 until full realisation, dismissing the claim for aggravated or exemplary damages, and assessment costs of RM30,000 to the second and third defendants:

(1) In relation to undertaking in damages, the jurisprudence established two important propositions. First, an undertaking as to damages was ordinarily enforceable once an injunction was set aside, and the burden rested on the plaintiff to demonstrate special circumstances if enforcement was to be withheld. Second, the court must still examine whether the losses claimed were causally linked to the restraint, whether they were reasonably foreseeable, and whether the defendants took reasonable steps to mitigate them (see para 23).

(2) The court noted that the injunctions remained in force for several years until they were finally set aside by the Court of Appeal in 2022. The appellate court held that the corporate defendants were improperly joined to the action as they were not privy to the shareholders' agreement that formed the foundation of the plaintiff's claim. That finding meant that there was never a proper legal basis to restrain the corporate defendants from dealing with their assets. The result was that they were deprived of the freedom to conduct their commercial affairs for a significant period of time without lawful justification (see para 27).

(3) Based on the evidence, the court found no 'special circumstances' that would warrant withholding enforcement of the undertaking in the present case. The plaintiff's conduct, while perhaps grounded in a genuine belief in his rights, did not alter the fact that the corporate defendants were restrained without basis. Nor had it been shown that the corporate defendants engaged in inequitable conduct that would disentitle them to relief. The fact that the Court of Appeal ordered an assessment of damages was itself consistent with the orthodox position that the undertaking should now be given effect. Accordingly, the court concluded that the corporate defendants were entitled to an inquiry as to damages (see para 29).

(4) The court opined that the LOI could not be dismissed as a mere non-binding expression of interest. Although styled 'subject to contract', the inclusion of exclusivity provisions, the corporate authorisations, and the seriousness of Matang Bhd's negotiations supported the conclusion that the parties intended to be bound in principle, with the formal agreement serving as a procedural step. The evidence demonstrated that

A the injunctions were the dominant and operative cause of the collapse of the sale, as they prevented the corporate defendants from proceeding with the transaction and created the prolonged uncertainty that ultimately led Matang Bhd to withdraw. Accordingly, the court found that but for the orders of restraint, the corporate defendants would have B been able to complete the sale to Matang Bhd on the agreed terms and would have had the benefit of the RM180m consideration. The alleged lack of communication was at most incidental and did not break the chain of causation (see paras 30 & 32–33).

C (5) Damages under an undertaking were compensatory in nature, not punitive. Their purpose was to place the defendants, so far as money can do, in the position they would have been in had the injunction not been granted. This required a careful exercise in judicial estimation. The court was guided not by speculative claims but by what was reasonable, just, D and supported by the available evidence. In the present case, the corporate defendants had not produced expert evidence of market investment rates, nor have they demonstrated what specific returns they would have achieved. The court was therefore left to undertake its own assessment based on what was fair and reasonable in the circumstances. A E liberal but measured approach was warranted. Further, considering that the corporate defendants were not passive investors but active commercial entities, the assessment of damages should be undertaken by reference to the position of the actual parties, rather than that of a cautious depositor content with a risk-free return (see paras 36, 42 & 44).

F (6) The court was unable to accept the plaintiff's argument that no damages had been suffered since the corporate defendants' assets had appreciated in value. Firstly, the factual matrix in *Tan Sri Khoo*'s case was wholly different. The present case did not concern a defaulting purchaser but the G deprivation of liquidity caused by court-imposed injunctions. Further, unlike in *Tan Sri Khoo*'s case, where the vendor continued to hold and benefit from the appreciating asset, the corporate defendants in the present case were immobilised by the injunctions and deprived of both the sale proceeds and the ability to leverage their economies of scale in H commercial operations. Secondly, appreciation in the value of the assets did not erase the fact of lost opportunity cost (see paras 38–41).

(7) The court found that a rate of 4%pa would strike a fair balance. It was modestly above the fixed deposit rate so as to acknowledge the corporate defendants' status as active commercial operators, while remaining I conservative enough to avoid speculative assumptions about high-risk or unusually profitable ventures. The court nevertheless declined to apply compounding, as this would risk inflating the award beyond what was strictly necessary to compensate the corporate defendants for their deprivation of capital. In adopting this simple annual rate of return, the

court ensured that the award reflected a reasonable commercial return that could have been obtained without venturing into conjecture or overcompensation. On this basis, the deprivation of RM180m over a period of five years yielded a compensable sum of RM36m (see para 45).

(8) In the present case, the court found no evidence that the plaintiff acted with malice or in an oppressive manner when seeking the injunctions. While the corporate defendants were wrongly restrained, the plaintiff's actions were undertaken in pursuit of what he believed to be his contractual rights under the shareholders' agreement. The absence of improper motive precluded any claim for aggravated damages. In relation to exemplary damages, the present case did not fall within any of the categories as provided in *Rookes v Barnard* [1964] AC 129. The plaintiff was not a public authority, nor did he act with a view to making a profit at the corporate defendants' expense beyond the litigation itself. This was, in essence, a private commercial dispute, and while the plaintiff's claim ultimately failed as against the corporate defendants, it was not prosecuted in bad faith or for collateral advantage. The imposition of exemplary damages would therefore be inconsistent with established principle (see paras 47–49).

[Bahasa Malaysia summary

Plaintif, pemegang saham defendan kedua dan ketiga, telah memfailkan tindakan berdasarkan dakwaan pelanggaran perjanjian pemegang-pemegang saham. Walaupun defendan kedua hingga kesebelas ('defendan-defendan korporat') bukanlah pihak-pihak dalam perjanjian tersebut, plaintif tetap mendapatkan injunksi sementara terhadap mereka untuk menghalang pelupusan aset-aset utama mereka, iaitu ladang kelapa sawit dan kilang minyak sawit ('aset-aset tersebut'). Perlu diingatkan bahawa pada masa yang material, terdapat surat niat ('LOI') yang ditandatangani di mana sebuah syarikat yang dikenali sebagai Matang Bhd menyatakan hasratnya untuk memperoleh aset-aset tersebut dengan harga RM180 juta. Injunksi tersebut kekal selama beberapa tahun sehingga ia diketepikan oleh Mahkamah Rayuan pada tahun 2022. Dalam hal ini, Mahkamah Rayuan memutuskan bahawa defendan-defendan korporat telah dimasukkan sebagai pihak secara tidak wajar dalam tindakan tersebut kerana mereka tidak privi kepada perjanjian pemegang-pemegang saham yang menyokong tuntutan plaintif tersebut. defendan-defendan korporat kemudiannya memfailkan permohonan semasa untuk penilaian ganti rugi menurut aku janji mengenai ganti rugi yang diberikan oleh plaintif. Isu-isu berikut timbul untuk penentuan: (a) hak untuk ganti rugi — sama ada pengenepian injunksi tersebut oleh Mahkamah Rayuan merupakan dapatan bahawa injunksi tersebut telah diberikan secara salah, dengan itu mencetuskan aku janji plaintif mengenai ganti rugi; (b) sebab-akibat dan LOI — sama ada LOI antara defendan-defendan korporat dan Matang Bhd boleh dikuatkuasakan, dan sama ada penjualan

A aset-aset tersebut mungkin akan menjadi kenyataan jika tidak kerana injunksi tersebut; (c) jumlah ganti rugi — jika hak telah dibuktikan, bagaimana ganti rugi harus dinilai — berhubung dengan isu ini, plaintif bergantung pada kes *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 ('kes *Tan Sri Khoo*') untuk berhujah bahawa memandangkan aset ladang B dan kilang defendan-defendan korporat telah meningkat nilainya dari semasa ke semasa, tiada kerugian telah dialami; dan (d) ganti rugi teladan atau teruk — sama ada tindakan plaintif dalam mendapatkan dan mengekalkan injunksi tersebut mewajarkan pemberian ganti rugi punitif atau teruk.

C **Diputuskan**, memerintahkan plaintif untuk membayar defendan-defendan sejumlah RM36 juta sebagai ganti rugi, berserta faedah pada kadar 5% setahun dari 6 Ogos 2025 sehingga realisasi penuh, menolak tuntutan ganti rugi teruk atau teladan, dan kos taksiran sebanyak RM30,000 kepada defendan kedua D dan ketiga:

(1) Berhubung dengan aku janji ganti rugi, jurisprudens telah menetapkan dua proposisi penting. Pertama, aku janji mengenai ganti rugi biasanya boleh dikuatkuasakan sebaik sahaja injunksi diketepikan, dan beban terletak pada plaintif untuk menunjukkan keadaan khas jika E penguatkuasaannya hendak ditahan. Kedua, mahkamah masih perlu memeriksa sama ada kerugian yang dituntut berkaitan secara kausal dengan kekangan tersebut, sama ada ia boleh dijangka secara munasabah, dan sama ada defendan-defendan mengambil langkah yang munasabah untuk mengurangkannya (lihat perenggan 23).

F (2) Mahkamah mengambil perhatian bahawa injunksi tersebut kekal berkuat kuasa selama beberapa tahun sehingga akhirnya diketepikan oleh Mahkamah Rayuan pada tahun 2022. Mahkamah Rayuan memutuskan bahawa defendan-defendan korporat telah dimasukkan sebagai pihak G secara tidak wajar dalam tindakan tersebut kerana mereka tidak privi kepada perjanjian pemegang-pemegang saham yang membentuk asas tuntutan plaintif tersebut. Dapatan tersebut bermakna bahawa tidak pernah ada asas undang-undang yang betul untuk menghalang defendan-defendan korporat daripada menguruskan aset-aset mereka. H Hasilnya ialah mereka telah dinafikan kebebasan untuk menjalankan urusan komersial mereka bagi tempoh masa yang lama tanpa justifikasi yang sah (lihat perenggan 27).

(3) Berdasarkan keterangan, mahkamah tidak menemui 'keadaan khas' yang akan mewajarkan penangguhan penguatkuasaan aku janji tersebut dalam I kes semasa. Tindakan plaintif, walaupun mungkin berasaskan kepercayaan tulen terhadap haknya, tidak mengubah fakta bahawa defendan-defendan korporat telah disekat tanpa asas. Tidak juga ditunjukkan bahawa defendan-defendan korporat terlibat dalam kelakuan tidak saksama yang akan menghalang mereka daripada

mendapat remedi. Hakikat bahawa Mahkamah Rayuan mengarahkan penilaian ganti rugi itu sendiri selaras dengan pendirian ortodoks bahawa aku janji tersebut kini harus dikuatkuasakan. Sehubungan itu, mahkamah menyimpulkan bahawa defendan-defendan korporat berhak untuk siasatan mengenai ganti rugi (lihat perenggan 29).

(4) Mahkamah berpendapat bahawa LOI tersebut tidak boleh ditolak sebagai pernyataan minat yang tidak mengikat semata-mata. Walaupun dinyatakan 'tertakluk kepada kontrak', kemasukan peruntukan eksklusiviti, kebenaran korporat, dan keseriusan rundingan Matang Bhd menyokong kesimpulan bahawa pihak-pihak berhasrat untuk terikat secara prinsip, dengan perjanjian formal yang berfungsi sebagai langkah prosedur. Keterangan menunjukkan bahawa injunksi tersebut adalah punca dominan dan operatif bagi kegagalan penjualan aset-aset tersebut, kerana ia menghalang defendan-defendan korporat daripada meneruskan transaksi dan mewujudkan ketidakpastian yang berpanjangan yang akhirnya menyebabkan Matang Bhd menarik diri. Sehubungan itu, mahkamah mendapati bahawa jika tidak ada perintah sekatan, defendan-defendan korporat tentu akan dapat memuktamadkan penjualan kepada Matang Bhd mengikut terma yang dipersetujui dan akan mendapat manfaat daripada balasan berjumlah RM180 juta. Kekurangan komunikasi yang didakwa jika wujud pun hanyalah sampingan dan tidak memutuskan rantaian sebab-akibat (lihat perenggan 30 & 32–33).

(5) Ganti rugi di bawah suatu aku janji bersifat pampasan, bukan hukuman. Tujuannya adalah untuk meletakkan defendan-defendan, setakat yang boleh diberikan pampasan dengan wang, dalam kedudukan yang sepatutnya mereka hadapi sekiranya injunksi tersebut tidak diberikan. Ini memerlukan penilaian kehakiman yang teliti. Mahkamah tidak dipandu oleh tuntutan spekulatif tetapi oleh apa yang munasabah, adil, dan disokong oleh keterangan yang ada. Dalam kes semasa, defendan-defendan korporat tidak mengemukakan keterangan pakar tentang kadar pelaburan pasaran, dan mereka juga tidak menunjukkan pulangan khusus yang mungkin boleh dikecapi. Oleh itu, mahkamah dibiarkan menjalankan penilaiannya sendiri berdasarkan apa yang adil dan munasabah dalam keadaan tersebut. Pendekatan yang liberal tetapi berkadar adalah wajar. Selain itu, memandangkan defendan-defendan korporat bukanlah pelabur pasif tetapi entiti komersial yang aktif, penilaian ganti rugi harus dilakukan dengan merujuk kepada kedudukan pihak sebenar, bukannya kedudukan pendeposit yang berhati-hati dengan pulangan bebas risiko (lihat perenggan 36, 42 & 44).

(6) Mahkamah tidak dapat menerima hujah plaintif bahawa tiada kerugian yang dialami memandangkan aset-aset defendan-defendan korporat meningkat nilainya. Pertama, matriks fakta dalam kes *Tan Sri Khoo*

adalah sama sekali berbeza. Kes semasa tidak melibatkan pembeli yang ingkar tetapi melibatkan sekatan kecairan yang disebabkan oleh injunksi yang dikenakan oleh mahkamah. Tambahan pula, tidak seperti dalam kes *Tan Sri Khoo*, di mana penjual secara berterusan memegang dan mendapat manfaat daripada aset yang meningkat nilainya, defendan-defendan korporat dalam kes semasa telah dikekang oleh injunksi tersebut dan telah kehilangan kedua-dua hasil jualan dan keupayaan untuk memanfaatkan skala ekonomi mereka dalam operasi komersial. Kedua, peningkatan nilai aset-aset tidak memadamkan fakta kerugian kos melepas (lihat perenggan 38–41).

(7) Mahkamah mendapati bahawa kadar 4% setahun akan memberikan keseimbangan yang adil. Ia adalah sedikit lebih tinggi daripada kadar deposit tetap bagi mengiktiraf status defendan-defendan korporat sebagai pengendali komersial yang aktif, sambil kekal cukup konservatif untuk mengelakkan andaian spekulatif tentang usaha niaga yang berisiko tinggi atau luar biasa menguntungkan. Walau bagaimanapun, mahkamah enggan menggunakan pengkompaunan, kerana ini akan berisiko meningkatkan award melebihi apa yang diperlukan untuk memberi pampasan kepada defendan-defendan korporat atas sekatan ke atas modal mereka. Dalam menerima pakai kadar pulangan tahunan yang mudah ini, mahkamah memastikan bahawa award tersebut mencerminkan pulangan komersial yang munasabah yang boleh diperolehi tanpa berjumlah kepada sangkaan atau pampasan berlebihan. Atas dasar ini, sekatan ke atas jumlah RM180 juta dalam tempoh lima tahun menghasilkan jumlah pampasan sebanyak RM36 juta (lihat perenggan 45).

(8) Dalam kes semasa, mahkamah tidak menemui apa-apa keterangan bahawa plaintif bertindak dengan niat jahat atau dengan cara yang menindas apabila memohon injunksi. Walaupun defendan-defendan korporat telah dihalang secara salah, tindakan plaintif telah dilakukan untuk mendapatkan apa yang dipercayainya sebagai hak kontraknya di bawah perjanjian pemegang-pemegang saham tersebut. Ketiadaan motif yang tidak wajar menghalang apa-apa tuntutan ganti rugi teruk. Berhubung dengan ganti rugi teladan, kes semasa tidak termasuk dalam mana-mana kategori seperti yang diperuntukkan dalam *Rookes v Barnard* [1964] AC 129. Plaintif bukanlah pihak berkuasa awam, dan dia juga tidak bertindak dengan tujuan untuk mengaut keuntungan atas perbelanjaan defendan-defendan korporat melampaui litigasi itu sendiri. Ini, pada dasarnya, merupakan pertikaian komersial persendirian, dan walaupun tuntutan plaintif akhirnya gagal terhadap defendan-defendan korporat, namun ia tidak dimulakan dengan niat jahat atau untuk kelebihan kolateral. Oleh itu, pengenaan ganti rugi teladan adalah tidak selaras dengan prinsip yang ditetapkan (lihat perenggan 47–49).]

Cases referred to

Attorney-General v Albany Hotel Co [1896] 2 Ch 696, Ch D (refd)
Blue Circle Industries plc v Ministry of Defence [1999] Ch 289, CA (refd)
Chappel v Davidson [1856] 8 De GM & G 1 (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Cheltenham and Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts and others [1993] 1 WLR 1545, CA (refd)
Fiona Trust & Holding Corporation and others v Privalov and others (No 2) [2017] 2 All ER 570, QBD (folld)
Graham v Campbell [1877] 7 Ch D 490, CA (refd)
Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal [2020] 10 MLJ 386, HC (refd)
Novello v James (1854) 5 De GM & G 876 (refd)
Rookes v Barnard [1964] AC 1129, HL (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (distd)
Ushers Brewery Ltd v PS King & Co (Finance) Ltd [1972] Ch 148, Ch D (refd)
Wakefield v Duke of Buccleugh (1865) 11 Jur NS 523 (refd)

Legislation referred to

Rules of Court 2012 O 37 r 1

Mark Ho (with Venkat Ram VK Dasaratharaj) (Chellam Wong) for the plaintiff.
Michael Chow (with Yasmeen Soh Sha-Nisse and Neoh Kai Sheng) (Siew, Khairul & Co) for the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and 11th defendants.
(YC Yong) for the first, 12th and 13th defendants.

Yusrin Faidz JC:

INTRODUCTION

[1] This matter comes before the court on the application of the second to 11th defendants ('the corporate defendants') for assessment of damages pursuant to the undertaking as to damages furnished by the plaintiff, Dato' Sri Andrew Kam Tai Yeow. The application arises from injunctions granted in 2017 and 2018 at the plaintiff's behest, which restrained the corporate defendants from disposing of their oil palm plantation and mill assets. The injunctions remained in place for several years until they were set aside by the Court of Appeal in 2022, which held that the corporate defendants were improperly joined to the action as they were not privy to the shareholders' agreement that underpinned the plaintiff's claim.

A BACKGROUND FACTS

[2] The factual backdrop may be shortly stated. The plaintiff, a shareholder of the second and third defendants, initiated proceedings alleging breaches of a shareholders' agreement dated 16 January 2017. Although the corporate B defendants were not parties to that agreement, the plaintiff nevertheless obtained interim injunctions against them in 2017 and 2018, restraining the disposal of their principal assets, namely an oil palm plantation and a palm oil mill.

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[3] At the material time, the corporate defendants were negotiating with Matang Bhd, a listed company, for the disposal of those assets. A letter of intent ('LOI') was executed in which Matang Bhd expressed its intention to acquire the assets for RM180m, subject to the execution of a formal agreement. D Resolutions were passed by the boards of the corporate defendants authorising the transaction, and Matang Bhd revised its offer upwards on more than one occasion, reflecting a sustained commercial interest in concluding the sale. The injunctions, however, had the effect of freezing the transaction.

E **[4]** On 12 January 2022, the Court of Appeal in Civil Appeals Nos W-02(IM)(NCC)-2007–10 of 2017, W-02(IM)(NCC)-2009–10 of 2017, W-02(IM)(NCC)-803–04 of 2018 and W-02(IM)(NCC)-795–04 of 2018 ordered, among others, that:

F (a) the plaintiff's claims against the second to 11th defendants be struck out;

(b) the interim injunction dated 6 September 2017 be discharged;

(c) the interim injunction dated 29 March 2018 be set aside; and

G (d) damages be assessed by the High Court and paid by the plaintiff to the second to 11th defendants for the losses and damages suffered as a result of the injunctions,

(see exh D3 of encl 991).

H **[5]** The corporate defendants collectively contend that they were deprived of RM180m in sale proceeds for a period of five years, causing them substantial financial loss. It has, however, been agreed that any damages arising from this deprivation are payable only to the second and third defendants, as they were the contracting parties to the proposed sale with Matang Bhd. The claim is I advanced on the basis that the loss of use of funds ought to be assessed at prevailing commercial interest rates, said to range between 3.5% and 8%pa. In addition, aggravated and exemplary damages are sought on the footing that the plaintiff had acted strategically and with malice in obtaining and prolonging the injunctions.

[6] The plaintiff denies liability, contending that the injunctions were properly granted at the time, that the LOI was not binding as it was expressly 'subject to contract' that Matang Bhd's withdrawal was due to the corporate defendants' own inaction, and that any losses are speculative in nature. He further asserts that the assets have appreciated in value in line with rising palm oil prices, thereby negating any alleged loss.

[7] Notice of appointment for taxation under O 37 r 1 of the Rules of Court 2012 ('the Rules') was filed on 23 November 2023 (encl 928). On 6 August 2025, upon the conclusion of the assessment hearing, this court ordered the defendants to pay the plaintiff the sum of RM36m as damages, together with interest at the rate of 5%pa from 6 August 2025 until full realisation, and assessment costs of RM30,000.

[8] Being dissatisfied with the quantum of damages awarded, the plaintiff has, through a notice of appeal dated 11 August 2025, duly lodged an appeal against the decision of this court.

ISSUES

[9] The following issues arise for determination:

(a) entitlement to damages — whether the Court of Appeal's setting aside of the injunctions amounts to a finding that the injunctions were wrongly granted, thereby engaging the plaintiff's undertaking as to damages;

(b) causation and the LOI — whether the LOI between the corporate defendants and Matang Bhd was enforceable, and whether the sale would probably have been completed but for the injunctions;

(c) quantum of damages — if entitlement is established, how damages should be assessed; and

(d) exemplary or aggravated damages — whether the plaintiff's conduct in obtaining and maintaining the injunctions warrants the grant of punitive or aggravated damages.

COUNSELS' CONTENTIONS

The defendants' contentions

[10] Learned counsel for the corporate defendants, Mr Michael Chow emphasised that the Court of Appeal's orders necessarily implied the injunctions were wrongly granted, thereby activating the undertaking as to damages. They relied on *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal* [2020] 10 MLJ 386 (HC) per Lee Swee Seng J (as

His Lordship then was), which holds that damages flow once an injunction is discharged, even absent an express finding of impropriety.

[11] Counsel contended that the LOI was an enforceable open contract within the meaning of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 (FC) as the essential terms ie parties, price, and subject matter, were settled, and board resolutions reflected binding intention. The fact that Matang Bhd revised its offer upwards showed a genuine commitment to purchase.

[12] Counsel argues that on this basis, the corporate defendants claimed that the injunctions deprived them of the use of RM180m, and that damages should be calculated at reasonable commercial interest rates for the five-year period. They further alleged that the plaintiff acted with malice by delaying his application for injunctions, by failing to disclose his financial position when giving the undertaking, and by pursuing committal proceedings without basis. These matters, they submitted, justified an award of aggravated or exemplary damages.

The plaintiff's contentions

[13] The plaintiff's submissions were to the contrary. Learned counsel for the plaintiff, Mr Mark Ho argued that no court has found the injunctions to have been 'wrongly granted,' and that the Court of Appeal's decision turned purely on procedural grounds relating to privity of contract.

[14] Counsel contended that the LOI was non-binding, being expressly 'subject to contract,' and that Matang Bhd's eventual withdrawal was due in part to the corporate defendants' own failure to provide updates. Counsel further asserted that no evidence was adduced to prove actual loss, as the corporate defendants failed to produce audited accounts or expert valuation. On the contrary, applying *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777 (SC), counsel maintained that the assets likely appreciated in value due to favourable commodity prices, which ought to offset any claim.

[15] As to exemplary damages, learned counsel for the plaintiff argued that the plaintiff was merely seeking to protect his legal rights under the shareholders' agreement, and that there was no malice or contumelious disregard to justify punitive awards.

COURT'S FINDINGS

[16] The requirement of an undertaking in damages as a precondition to the grant of an interim injunction has long been recognised in equitable jurisprudence. Its origins may be traced to 19th century authorities such as *Novello v James* (1854) 5 De GM & G 876, *Chappel v Davidson* [1856] 8 De GM & G 1, and *Wakefield v Duke of Buccleugh* (1865) 11 Jur NS 523. The undertaking is not directed to the restrained party but is given to the court itself. It reflects the principle that if it is later determined that the injunction was wrongly granted and loss has been caused to the defendant or any third party, justice requires that such loss should be borne by the plaintiff who sought the order, not the party who was improperly restrained.

[17] This principle was affirmed in *Attorney-General v Albany Hotel Co* [1896] 2 Ch 696 (CA), where the English Court of Appeal held that the entitlement to damages does not arise automatically, but depends on the court's decision to enforce the undertaking. The undertaking thus provides a discretionary mechanism by which the court ensures fairness in cases where interlocutory relief is subsequently discharged.

[18] In *Cheltenham and Gloucester Building Society (formerly Portsmouth Building Society) v Ricketts and others* [1993] 1 WLR 1545 (CA), the English Court of Appeal clarified that the form of the undertaking itself leaves it to the court's discretion whether to enforce it at all. Peter Gibson LJ at pp 1554–1555 observed that this discretion is wide and unfettered:

> The form of the undertaking indicates that the court has a discretion whether to enforce it at all and that discretion is not limited in any way.

[19] While Neill LJ at pp 1550–1551 of the same case explained that the purpose of the undertaking is not to suggest that rights of the defendant have been infringed, but to provide a means of compensating a party if it later appears that the injunction was wrongly granted. His Lordship held as follows:

> When granting an injunction of an interlocutory nature it is the usual practice of the court to require the plaintiff to give an undertaking as to damages. *The use of the word 'damages' is perhaps inappropriate because it might suggest that the grant of the injunction involved a breach of some legal or equitable rights of the defendant. The undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted*. (Emphasis added.)

[20] In *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] Ch 148 (HC), it was held that if a defendant who has been restraint by an interim injunction, obtains a judgment establishing his right to do the act in question, he may obtain compensation for any injury sustained by him on the account of

A the restraint. In *Graham v Campbell* [1877] 7 Ch D 490, James LJ held (at p 494) as follows:

> The undertaking as to damages which ought to be given in every interlocutory injunction is one to which (*unless under special circumstances*) effect ought to be given. If any damage has been occasioned by an interlocutory injunction, which, on the hearing, if found to have been wrongly asked for, justice requires that such damage should fall on the voluntary litigant who fails, not on the litigant who has been without just cause made so. (Emphasis added.)

[21] In *Cheltenham and Gloucester Building Society v Ricketts,* Peter Gibson LJ observed, with clarity and precision, that the plaintiffs good faith, court's refusal to order costs against unsuccessful plaintiff, and the inequitable conduct of the defendant, could constitute special circumstances sufficient to bar the defendant from recovering damages (at p 1557):

> There are only a few reported decisions on what constitute special circumstances. In *Modern Transport Co Ltd v Duneric Steamship Co* [1917] 1 KB 370, 380, Swinfen Eady LJ said that inequitable conduct by the defendant constituted special circumstances such that no inquiry as to damages was to be granted even if the claim for an injunction could not be sustained at the trial; but that was a case where he held that the plaintiffs were justified in applying for an interlocutory injunction. In *Upper Canada College v City of Toronto* (1917) 40 OLR 483, the court in refusing to order an inquiry as to damages on an undertaking given on the grant of an interlocutory injunction discharged at the trial, had regard to a number of circumstances including the *good faith of the plaintiffs* and *the fact that no costs were awarded against them when the action was dismissed. In Attorney-General for Ontario v Harry* (1982) 25 CPC 67 *a factor taken into account by the court in refusing to enforce an undertaking as to damages, notwithstanding the discharge at the trial of the interlocutory injunction, was the inequitable conduct of the defendants*. (Emphasis added.)

[22] In *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor for another appeal,* the plaintiff had filed for an action to restraint the defendant, Star Media Group Bhd ('Star Media') from receiving the bank guarantees of RM25m each from Ambank (M) Bhd and United Overseas Bank (M) Bhd. The plaintiff had given undertaking to pay damages in the event the injunctions applied for were set aside. The relevant injunctions were set aside and the defendant had applied for assessment of damages. In granting damages, the High Court at paras [32] and [34] held as follows:

> [32] The assessment of damages is pursuant to the undertaking given to the court by the plaintiff and unless the court had ordered that there be no assessment of damages for reasons that it would invariably give, the defendant, Star Media is entitled to hold the plaintiff to its undertaking and to pray that it should make good its undertaking to pay damages arising from the loss suffered by Star Media because of the ad interim orders.
>
> ...

[34] Given that plaintiff had already acknowledged by way of the Court of Appeal order Star Media's right to file the application herein despite not filing any application to set aside the interim injunctions, I agree with the defendant that the plaintiff is barred and estopped from raising any dispute as to the propriety or validity of the application to enforce the undertaking pursuant to the Court of Appeal order.

[23] The jurisprudence therefore establishes two important propositions. First, an undertaking as to damages is ordinarily enforceable once an injunction is set aside, and the burden rests on the plaintiff to demonstrate special circumstances if enforcement is to be withheld. Second, the court must still examine whether the losses claimed are causally linked to the restraint, whether they were reasonably foreseeable, and whether the defendants took reasonable steps to mitigate them. With these guiding principles in place, I now turn to the specific issues that arise for determination in this case.

Issue 1: Entitlement to damages

[24] The first issue is whether the corporate defendants are entitled to damages following the discharge of the injunctions by the Court of Appeal. The requirement of an undertaking in damages is a longstanding feature of equitable relief. Its object is to strike a balance between the plaintiff's need for urgent protection and the defendant's right not to be unjustly prejudiced by an interim order that may later prove to have been unjustified.

[25] The authorities leave no doubt that effect should ordinarily be given to such undertakings. In *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* and *Graham v Campbell,* it was affirmed that damages occasioned by an interlocutory injunction, which on fuller consideration proves to have been wrongly sought, ought to fall on the plaintiff who voluntarily invoked the court's equitable jurisdiction, rather than the defendant who was restrained without just cause.

[26] It is true that the discretion to enforce the undertaking is not without limits. As illustrated in *Cheltenham and Gloucester Building Society v Ricketts, Modern Transport Co Ltd v Duneric Steamship Co, Upper Canada College v City of Toronto,* and *Attorney-General for Ontario v Harry,* cases recognise that 'special circumstances' may justify refusing an inquiry, such as good faith on the part of the plaintiff, inequitable conduct by the defendant, or the absence of an adverse costs order. But the starting point remains that the undertaking should be enforced, and the burden rests on the plaintiff to displace that presumption.

[27] Applying these principles to the present case, I note that the injunctions remained in force for several years until they were finally set aside by the Court

of Appeal in 2022. The appellate court held that the corporate defendants were improperly joined to the action as they were not privy to the shareholders' agreement that formed the foundation of the plaintiff's claim. That finding means that there was never a proper legal basis to restrain the corporate defendants from dealing with their assets. The result was that they were deprived of the freedom to conduct their commercial affairs for a significant period of time without lawful justification.

[28] The plaintiff argues that he acted in good faith and that the Court of Appeal did not expressly pronounce the injunctions 'wrongly granted'. This submission cannot prevail. The jurisprudence, as reflected in *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor,* makes clear that it is not necessary for an appellate court to use the phrase 'wrongly granted'. It is sufficient that the injunction has been discharged on grounds that reveal it was unjustified as against the restrained party. The absence of an express finding of bad faith or impropriety does not negate the entitlement to damages. The undertaking is intended to protect defendants from harm resulting from any unjustified restraint, irrespective of the plaintiff's subjective motives.

[29] From the evidence presented before me, I find no 'special circumstances' that would warrant withholding enforcement of the undertaking in this case. The plaintiff's conduct, while perhaps grounded in a genuine belief in his rights, does not alter the fact that the corporate defendants were restrained without basis. Nor has it been shown that the corporate defendants engaged in inequitable conduct that would disentitle them to relief. The fact that the Court of Appeal ordered an assessment of damages is itself consistent with the orthodox position that the undertaking should now be given effect. Accordingly, I conclude that the corporate defendants are entitled to an inquiry as to damages.

Issue 2: Causation and the LOI

[30] The second issue concerns whether the corporate defendants have demonstrated a sufficient causal link between the injunctions and the loss alleged, namely the failure of the proposed sale to Matang Bhd under the LOI. Having considered the evidence and authorities, I find that the LOI cannot be dismissed as a mere non-binding expression of interest. Although styled 'subject to contract' the inclusion of exclusivity provisions, the corporate authorisations, and the seriousness of Matang Bhd's negotiations support the conclusion that the parties intended to be bound in principle, with the formal agreement serving as a procedural step.

[31] The approach in *Charles Grenier Sdn Bhd v Lau Wing Hong* makes clear that where essential terms are agreed, an LOI may constitute an enforceable

open contract. In the said case, Gopal Sri Ram JCA (as His Lordship then was) at pp 335[I], and 336[A] to [F] held as follows:

> We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.
>
> *They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract. It is enforceable as if it was embodied in a document with all the attendant solemnity*. In order to give it effect, the law will — acting out of necessity (see *Liverpool City Council v Irwin* [1977] AC 239) — imply terms into the contract for sale in order to make it work. See *Rojasara Ramjbhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.
>
> Dr Geoffrey Cheshire in the 10th edition of his work, *The Modern Law of Real Property*, describes an open contract as follows:
>
> > If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.
>
> *The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it is, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely formalize the agreement already concluded between the parties*. We therefore entertain no difficulty whatsoever in rejecting the argument advanced by Mr Abraham upon the first issue. (Emphasis added.).

[32] Further, it is significant that Matang Bhd's termination letter dated 22 July 2019 cited the protracted duration of the injunctions as a central reason for its withdrawal from the transaction (see exh D10 of encl 991). Although reference was also made to the absence of communication from the corporate defendants, I am satisfied that such omission was only a secondary consideration and not decisive. The evidence demonstrates that the injunctions were the dominant and operative cause of the collapse of the sale, as they prevented the corporate defendants from proceeding with the transaction and created the prolonged uncertainty that ultimately led Matang Bhd to withdraw.

[33] Accordingly, I find that but for the orders of restraint, the corporate defendants would have been able to complete the sale to Matang Bhd on the

agreed terms and would have had the benefit of the RM180m consideration. The alleged lack of communication was at most incidental and does not break the chain of causation.

Issue 3: Quantum of damages

[34] Having found that the injunctions were the operative cause of the failed transaction with Matang Bhd, the next issue is how the damages should properly be assessed. The corporate defendants argue that they were deprived of the opportunity to realise RM180m and, more importantly, of the use of such funds over a period of nearly five years. They contend that damages should be quantified by reference to the commercial rate of return they could reasonably have expected had the sale proceeds been available to them.

[35] The plaintiff, on the other hand, submits that no reliable basis has been provided for quantification, noting the absence of audited accounts, expert valuation, or evidence of any specific investment that the corporate defendants would have undertaken. plaintiff further suggests that any alleged loss is offset by the appreciation in value of the assets during the same period, particularly in light of rising palm oil prices.

[36] The court begins with the settled principle that damages under an undertaking are compensatory in nature, not punitive. Their purpose is to place the defendants, so far as money can do, in the position they would have been in had the injunction not been granted. This requires a careful exercise in judicial estimation, recognising that mathematical precision is rarely possible in such cases. The court is guided not by speculative claims but by what is reasonable, just, and supported by the available evidence.

[37] The orthodox method of assessment is to evaluate the actual financial loss suffered. In cases where the injunction prevents a defendant from completing a sale, the natural starting point is the value of the consideration that was lost or deferred. Here, the evidence demonstrates that the corporate defendants were ready to sell their plantation and mill assets for RM180m, that Matang Bhd was willing to buy on those terms, and that the transaction would have proceeded but for the injunctions. The appropriate focus, therefore, is not the underlying market value of the assets, which the plaintiff suggests may have appreciated, but the deprivation of liquidity. This represented by the inability to access and use the RM180m that the corporate defendants would have received under the sale.

[38] The plaintiff's solicitors have relied on *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* to argue that because the corporate defendants' plantation and mill assets have appreciated in value over time, no damages have

been suffered. I am unable to accept that proposition in the present case.

[39] First, the factual matrix in *Tan Sri Khoo* was wholly different. That case concerned the termination of a sale and purchase agreement for land, where the purchaser defaulted on payment and the vendor forfeited the deposit. The subsequent appreciation in the value of the land was relevant to whether the vendor had suffered any real loss upon the purchaser's failure to complete. The court held that in those circumstances, the vendor had not suffered damages, as the land itself had retained and indeed increased in value, mitigating any supposed loss.

[40] By contrast, the present case does not concern a defaulting purchaser but the deprivation of liquidity caused by court-imposed injunctions. The corporate defendants were prevented from completing a transaction for RM180m and were thereby denied the use of those funds for nearly five years. The claim here is not about diminution in the value of the underlying assets, but about the lost opportunity to deploy capital. Unlike in *Tan Sri Khoo*, where the vendor continued to hold and benefit from the appreciating asset, the corporate defendants were immobilised by the injunctions and deprived of both the sale proceeds and the ability to leverage their economies of scale in commercial operations.

[41] Secondly, appreciation in the value of the assets does not erase the fact of lost opportunity cost. The ability to access and use liquid capital is itself of independent value, as recognised in *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289 (CA) and *Jaks Island Circle Sdn Bhd v Star Media Group Bhd & Anor*. The injunctions denied the corporate defendants that opportunity, regardless of any later increase in asset value. In any event the plaintiff has adduced no evidence sufficient to displace this claim or to show that the alleged appreciation of assets neutralised the loss of liquidity. Mere conjecture about market movements cannot substitute for evidence.

[42] At the same time, I accept that the quantification of such loss must be approached with caution. The corporate defendants have not produced expert evidence of market investment rates, nor have they demonstrated what specific returns they would have achieved. The court is therefore left to undertake its own assessment based on what is fair and reasonable in the circumstances. A liberal but measured approach is warranted.

[43] In this respect, I am guided by the reasoning in *Fiona Trust & Holding Corporation and others v Privalov and others (No 2)* [2017] 2 All ER 570 (HC), where it is emphasised that, in the absence of precise evidence, the court may adopt a broad and reasonable assessment rather than decline relief altogether.

The court is not bound to exactitude; its duty is to arrive at a figure that fairly reflects the justice of the case.

[44] In addressing the appropriate rate of return, the plaintiff contends that the prevailing fixed deposit rate should serve as the benchmark on the basis that it represents a risk-free yield. The corporate defendants, for their part, also submitted that this rate, ie 3.51%pa, may be taken as the minimum measure of compensation. I am unable to agree with this approach. The corporate defendants are not passive investors but active commercial entities. It is reasonable to infer that, had the RM180m been available to them, they would have deployed the funds in the ordinary course of business, whether by expanding production capacity, reducing debt, or pursuing investments that leverage their economies of scale. Such commercial deployment of capital would naturally yield a higher return than a mere fixed deposit. The assessment of damages should therefore be undertaken by reference to the position of the actual parties, rather than that of a cautious depositor content with a risk-free return.

[45] A rate of 4%pa strikes a fair balance. It is modestly above the fixed deposit rate so as to acknowledge the corporate defendants' status as active commercial operators, while remaining conservative enough to avoid speculative assumptions about high-risk or unusually profitable ventures. I nevertheless decline to apply compounding, as this would risk inflating the award beyond what is strictly necessary to compensate the corporate defendants for their deprivation of capital. In adopting this simple annual rate of return, the court ensures that the award reflects a reasonable commercial return that could have been obtained without venturing into conjecture or overcompensation. On this basis, the deprivation of RM180m over a period of five years yields a compensable sum of RM36m.

Issue 4: Exemplary or aggravated damages

[46] The final issue concerns the corporate defendants' claim for aggravated and exemplary damages. It is trite that both forms of damages are exceptional remedies, awarded not as a matter of course but only where the circumstances of the case justify them.

[47] Aggravated damages are compensatory in nature. They are intended to address injury to feelings, dignity, or reputation caused by the defendant's conduct where it is high-handed, insulting, oppressive, or malicious. Such awards are often made in torts involving personal wrongs, such as defamation, false imprisonment, or trespass. They are not awarded simply because a party has suffered loss or inconvenience from litigation. In the present case, I find no evidence that the plaintiff acted with malice or in an oppressive manner when

seeking the injunctions. While the corporate defendants were wrongly restrained, the plaintiff's actions were undertaken in pursuit of what he believed to be his contractual rights under the shareholders' agreement. The absence of improper motive precludes any claim for aggravated damages.

[48] Exemplary damages stand on a different footing. They are punitive in character, designed not to compensate the claimant but to punish the defendant and deter others. As clarified by the House of Lords in *Rookes v Barnard* [1964] AC 1129 (HL), exemplary damages are confined to three categories:

(a) oppressive, arbitrary, or unconstitutional action by government servants;

(b) conduct calculated by the defendant to profit at the expense of the plaintiff, exceeding the compensation payable; and

(c) cases expressly authorised by statute. These categories have been applied cautiously, reflecting the principle that civil remedies should generally be compensatory rather than penal.

[49] Measured against these principles, this case does not fall within any of the recognised categories. The plaintiff is not a public authority, nor did he act with a view to making a profit at the corporate defendants' expense beyond the litigation itself. This is, in essence, a private commercial dispute, and while the plaintiff's claim ultimately failed as against the corporate defendants, it was not prosecuted in bad faith or for collateral advantage. The imposition of exemplary damages would therefore be inconsistent with established principle.

[50] Accordingly, I dismiss the corporate defendants' claims for aggravated and exemplary damages. The compensatory award already assessed under the undertaking in damages is, in my judgment, sufficient to achieve fairness between the parties.

DECISION

[51] For the foregoing reasons, I make the following orders:

(a) the plaintiff shall pay the second and third defendants the sum of RM36m as damages;

(b) interest at the rate of 5%pa shall run from 6 August 2025 until full realisation;

(c) the claim for aggravated or exemplary damages is dismissed; and

(d) assessment costs of RM30,000 to the second and third defendants.

Plaintiff was ordered to pay defendants RM36m as damages together with interest

at the rate of 5%pa from 6 August 2025 until full realisation; claim for aggravated or exemplary damages dismissed; assessment costs of RM30,000 to second and third defendants.

Reported by Dzulqarnain Ab Fatar